Armed Forces Council, Malaysia & Anor v Major Fadzil bin Arshad

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–519 OF 2010
ZALEHA ZAHARI, MOHD HISHAMUDIN AND LINTON ALBERT JJCA
3 NOVEMBER 2011

Armed Forces — Appeal — Appeal by Armed Forces Council ('Council') against decision of High Court — Council recommended to King de-commissioning and forced retirement of Air Force officer — Royal assent granted — No reasons for action given to officer — Whether officer entitled to know reasons for action by Council — Whether officer had right to be heard before recommendation made — Whether Council's letter to King valid recommendation — Whether King's decision to de-commission officer and require forced retirement ultra vires — Armed Forces Act 1972 s 9 — Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 reg 20(2)(e) — Federal Constitution arts 132 & 135(1)

The respondent, who was a Major in the Royal Malaysian Air Force (RMAF), had his commission cancelled pursuant to s 9 of the Armed Forces Act 1972 ('the Act'). He was also required to retire from service pursuant to reg 20(2)(e) of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 ('the Regulations'). The decision to recommend his de-commissioning and forced retirement to the Yang di-Pertuan Agong for his assent under the Act and the Regulations was taken at a meeting of the first appellant ('the Council'), a body established under the Federal Constitution and responsible for the administration of the Armed Forces in the country. The respondent was not informed of the grounds upon which the council had decided to make the recommendations, which, in due course, received the Royal Assent. The respondent applied to the High Court by way of judicial review to declare the cancellation of his commission as null and void, for certiorari to quash that decision and for mandamus to compel the appellants to reinstate him, as well as for damages. The High Court held, inter alia, that the Council's decision to make the recommendations to the King without giving its reasons for doing so to the respondent, made the decision contrary to law. The appellants argued that the High Court was wrong in holding that what the council had done was judicially reviewable. They said the Council did not make any 'decision' as the power to decommission under s 9 of the Act and the power to retire an officer under reg 20(2)(e) of the Regulations lay with the King and not with the council. Regarding the respondent's argument that he had a right to be heard by the Council before it had made its recommendations to the King, the appellants said art 135(1) read with art 132 of the Federal Constitution denied

any member of the Armed Forces of the right to be heard. The respondent maintained he should have been given an opportunity to be heard by the Council at the pre-recommendation stage and by failing to do so and in failing to furnish him the grounds upon which the recommendations were made, the council had acted arbitrarily. Consequently, he said, the decisions made by the King based on the Council's recommendations, were null and void. In coming to its decision, the appeal court, inter alia, noted that an affidavit of the secretary of the Council filed in the proceedings did not suggest the respondent had been guilty of any wrong-doing but in fact acknowledged that he had an excellent service record during his 27 years with the RMAF. The affidavit did not state any reason why the recommendations by the Council were made.

Held, allowing the appeal, setting aside the High Court's decision and dismissing the respondent's claim with costs:

(1) (per **Zaleha Zahari** and **Linton Albert JJCA**): The cancellation of the commission and the retirement of the respondent was valid and of full legal effect (see para 20).

(2) (per**Zaleha Zahari** and **Linton Albert JJCA**): The express exclusion of the armed forces in art 135(1) of the Federal Constitution must necessarily be construed to mean an officer in the armed forces did not enjoy the right of being heard which was conferred on members of other public services mentioned in art 132 (see para 17).

(3) (per **Zaleha Zahari** and **Linton Albert JJCA**): An officer in the armed forces held office at the will and pleasure of the King by reason of s 9 of the Act. An arbitrary power was conferred upon the King to cancel the commission of such officer upon the recommendation of the Council. A court had no jurisdiction to inquire into the circumstances under which such officer ceased to hold office (see para 15).

(4) (per **Mohd Hishamudin JCA, dissenting**): As there was no valid recommendation from the council, the act of His Majesty cancelling the respondent's commission and requiring his forced retirement was ultra vires both s 9 of the Act and reg 20 (see paras 39–40).

(5) (per **Mohd Hishamudin JCA, dissenting**): The letter to His Majesty from the Council was not a 'recommendation' for the purpose of s 9 of the Act because it did not contain the facts and reasons for requesting the King to cancel the respondent's commission. The letter merely requested the King to cancel the respondent's commission and require him to retire. This was highly improper and not in accordance with the intention and spirit of s 9 (see para 38).

(6) (per **Mohd Hishamudin JCA, dissenting**): Under s 9, the King was not expected to, and could not, act in a mechanical fashion. He was expected to exercise his discretion and apply his mind to the matter before him:

whether or not the commission of the respondent should be cancelled. The Wednesbury principle required the King to make a rational and reasonable decision but he could only do that if he had the facts and reasons before him (see para 40).

(7) (per **Mohd Hishamudin JCA, dissenting**): The council had a duty to act rationally and reasonably. It must have had a reason and if it did in fact have a reason, then that reason must have been conveyed to the King when making the recommendations. Even the minutes of the council's meeting did not contain any reason for the 'recommendation'. The court could not assume the council had a reason, let alone one that was reasonable and rational. The only fair inference that could be drawn was that the Council did not have any reason to recommend the respondent be de-commissioned or retired (see para 41).

(8) (per **Mohd Hishamudin JCA, dissenting**): The Regulations intended the reason for the forced retirement be made known to the respondent as the words 'without assigning any reason therefor' found in s 9 of the Act were absent in reg 20 while reg 20(2)(e) spelt out what ought to be and ought not to be the reason for the forced retirement. Nothing in the Act stated that an officer who was de-commissioned automatically had to be compulsorily retired under reg 20 (see para 44).

[Bahasa Malaysia summary

Responden, seorang Mejar dalam Tentera Udara Diraja Malaysia ('TUDM'), dibatalkan pentauliahannya menurut s 9 Akta Angkatan Tentera 1972 ('Akta'). Dia juga dikehendaki untuk bersara daripada perkhidmatan menurut peraturan 20(2)(e) Peraturan-Peraturan Angkatan Tentera (Pencen, Ganjaran dan Faedah-faedah Lain) 1982 ('Peraturan-Peraturan'). Keputusan untuk mencadangkan penarikan pentauliahan persaraan paksaan tersebut kepada Yang di-Pertuan Agong untuk diperkenankan di bawah Akta dan Peraturan-Peraturan diambil pada mesyuarat perayu pertama ('Majlis'), sebuah badan yang ditubuhkan di bawah Perlembagaan Persekutuan dan bertanggungjawab bagi pentadbiran angkatan tentera di negara ini. Responden tidak dimaklumkan mengenai alasan-alasan yang mana telah diputuskan oleh Majlis untuk membuat cadangan, yang, dalam masa terdekat, menerima perkenan Diraja. Responden memohon kepada Mahkamah Tinggi melalui semakan kehakiman untuk mengisytiharkan pembatalan pentauliahan tersebut sebagai batal dan tidak sah, untuk certiorari bagi membatalkan keputusan tersebut dan untuk mandamus bagi memaksa perayu-perayu untuk memasukkan semula namanya, serta bagi ganti rugi. Mahkamah Tinggi memutuskan, antara lain, bahawa keputusan Majlis untuk membuat cadangan kepada Raja tanpa memberi sebab-sebab untuk berbuat demikian kepada responden, menjadikan keputusan tersebut bertentangan dengan undang-undang. Perayu-perayu menghujahkan bahawa Mahkamah Tinggi terkhilaf dalam memutuskan bahawa apa diputuskan oleh Majlis boleh

disemak semula kehakimannya. Mereka menghujahkan bahawa Majlis tidak membuat apa-apa 'keputusan' kerana kuasa untuk penarikan pentauliahan di bawah s 9 Akta dan kuasa untuk bersara seseorang pegawai di bawah peraturan 20(2)(e) Peraturan-Peraturan terletak pada Raja dan tidak dengan Majlis. Berkenaan hujah responden bahawa dia mempunyai hak untuk didengar oleh Majlis sebelum cadangan dibuat kepada Raja, perayu-perayu menghujahkan perkara 135(1) dibaca bersama perkara 132 Perlembagaan Persekutuan menafikan mana-mana anggota tentera hak untuk didengar. Responden mengekalkan bahawa dia sepatutnya telah diberi peluang untuk didengar oleh Majlis di peringkat pra-cadangan dan dengan kegagalan untuk berbuat demikian dan kegagalan memberikan alasan-alasan berdasarkan cadangan-cadangan telah dibuat, Majlis telah bertindak sewenang-wenangnya. Sehubungan itu, dia menghujahkan, keputusan yang dibuat oleh Raja berdasarkan syor Majlis, adalah batal dan tidak sah. Dalam memutuskannya, Mahkamah Rayuan, antara lain, menyatakan bahawa afidavit Setiausaha Majlis yang difailkan dalam prosiding tersebut tidak mencadangkan responden telah melakukan apa-apa salah melakukan tetapi sebenarnya memperakui bahawa dia mempunyai rekod perkhidmatan cemerlang pada sepanjang 27 tahun dengan TUDM. Afidavit tersebut tidak menyatakan apa-apa sebab mengapa cadangan-cadangan oleh Majlis telah dibuat.

Diputuskan, membenarkan rayuan tersebut, mengetepikan keputusan Mahkamah Tinggi dan menolak tuntutan responden dengan kos:

(1) (oleh **Zaleha Zahari** dan **Linton Albert HHMR**): Pembatalan pentauliahan dan persaraan responden adalah sah dan mempunyai kesan penuh di sisi undang-undang (lihat perenggan 20).

(2) (oleh **Zaleha Zahari** dan **Linton Albert HHMR**): Pengecualian nyata angkatan tentera dalam perkara 135(1) Perlembagaan Persekutuan semestinya ditafsirkan sebagai bererti seorang pegawai dalam angkatan tentera tidak menikmati hak didengar yang telah diberikan kepada anggota perkhidmatan awam yang lain yang disebut dalam perkara 132. (lihat perenggan 17).

(3) (oleh **Zaleha Zahari** dan **Linton Albert HHMR**): Seseorang pegawai dalam angkatan tentera memegang jawatan atas kehendak Raja berikutan s 9 Akta. Kuasa yang sewenang-wenangnya telah diberikan kepada Raja untuk membatalkan pengambilan pegawai tersebut atas cadangan Majlis. Mahkamah tidak mempunyai bidang kuasa untuk menyiasat keadaan di mana pegawai tersebut tidak lagi memegang jawatan (lihat perenggan 15).

(4) (oleh **Mohd Hishamudin HMR, menentang**): Memandangkan tiada cadangan yang sah daripada Majlis, tindakan Raja membatalkan pentauliahan responden dan memaksanya bersara adalah *ultra vires* kedua-dua s 9 Akta dan Peraturan 20 (lihat perenggan 39–40).

(5) (oleh **Mohd Hishamudin HMR, menentang**): Surat kepada Raja daripada Majlis bukanlah 'cadangan' bagi maksud s 9 Akta kerana ia tidak mengandungi fakta-fakta dan sebab-sebab untuk meminta Raja untuk membatalkan pentauliahan responden. Surat tersebut semata-mata meminta Raja agar membatalkan pentauliahan responden dan memintanya untuk bersara. Ini adalah sangat tidak wajar dan tidak selaras dengan niat dan maksud s 9 (lihat perenggan 38).

(6) (oleh **Mohd Hishamudin HMR, menentang**): Di bawah s 9, Raja tidak dijangka, dan tidak boleh bertindak secara mekanikal. Baginda dijangka menggunakan budi bicaranya dan menggunakan fikirannya bagi perkara di hadapannya: sama ada atau tidak pentauliahan responden patut dibatalkan. Prinsip Wednesbury memerlukan Raja untuk membuat keputusan yang rasional dan munasabah tetapi baginda hanya boleh berbuat demikian jika baginda mempunyai fakta-fakta dan sebab-sebab di hadapannya (lihat perenggan 40).

(7) (oleh **Mohd Hishamudin HMR, menentang**): Majlis mempunyai tanggungjawab untuk bertindak secara rasional dan munasabah. Ia mesti mempunyai sebab dan jika ia bersebab sebab, maka sebab itu mesti telah disampaikan kepada Raja apabila membuat cadangan. Minit mesyuarat Majlis, malahan, tidak mengandungi apa-apa sebab bagi 'cadangan'. Mahkamah tidak boleh menganggap Majlis mempunyai sebab, apatah lagi yang munasabah dan rasional. Kesimpulan adil yang dapat dibuat adalah bahawa Majlis tidak mempunyai apa-apa sebab untuk mengesyorkan penarikan pentauliahan atau persaraan responden (lihat perenggan 41).

(8) (oleh **Mohd Hishamudin HMR, menentang**): Peraturan-peraturan yang dimaksudkan bagi persaraan dibuat kepada responden kerana perkataan *without assigning any reason therefor* dalam s 9 Akta telah tidak didapati dalam peraturan 20 sementara peraturan 20(2)(e) menyatakan apa yang patut dan tidak patut menjadi alasan bagi persaraan paksaan. Tiada apa-apa jua dalam Akta tersebut menyatakan bahawa seseorang pegawai yang ditarik penauliahannya akan secara automatik menjadi wajib bersara di bawah Peraturan 20 (lihat perenggan 44).]

Notes

For cases on appeal in general, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1851–1852.

Cases referred to

Abdul Salam Husin v Majlis Angkatan Tentera & Anor [2011] 2 CLJ 1, FC (refd)

Abdul Salam bin Husin v Majlis Angkatan Tentera & Anor [2009] 6 MLJ 170, CA (refd)

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, CA (refd)

Legislation referred to

Armed Forces Act 1972 ss 9, 161
Armed and Air Forces (Terms of Service) Regulations 1961
Federal Constitution arts 41, 132, 135, 135(1), (2), 137(1)
Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 regs 20(2)(e), (g), 22(6)(a)(i)

Appeal from: Application for Judicial Review No R4(2)–25–345 of 2008 (High Court, Kuala Lumpur)

Noor Hisham bin Ismail (Shamsul bin Holhassan with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellants.
Lt Col (B) Zalil Mohd Mess (Zalil Mohd & Partners) for the respondent.

Zaleha Zahari JCA:

[1] The majority decision of this court was to allow the appellants' (respondents in the court below) appeal against the decision of the High Court judge Kuala Lumpur dated 3 August 2010 and to set aside the said decision.

[2] The applicant at the material time was commissioned as an officer with the rank of Major in Tentera Udara Malaysia ('TUDM') and was attached to Pengkalan Udara Butterworth, Pulau Pinang. As such an officer the applicant is governed by the Armed Forces Act 1972 ('the Act'), the Army and Air Force (Terms of Service) Regulations 1961 [PU (A) 123/1961] as well as the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 [PU (A) 123/1982] ('the 1982 Regulations').

[3] The Armed Forces Council (the first respondent) is established pursuant to art 137(1) of the Federal Constitution and is responsible for the administration of the armed forces in Malaysia.

[4] What transpired in this case was this. The Panglima Tentera Udara ('PTU') issued a show cause letter dated 5 November 2007 to the applicant in respect of the allegations of misconduct specified therein. The applicant responded by letter dated 16 November 2007 by which letter he denied the allegations of misconduct and negligence specified in the said show cause letter. There was no further action against the applicant arising from this show cause letter.

[5] At the first respondent's 470th meeting held on 24 June 2008, the first

respondent made a decision to recommend to the Yang di-Pertuan Agong to cancel the applicant's commission under s 9 of the Act and to retire him from service pursuant to reg 20(2)(e), and be paid retirement benefits up to 90% of his gratuity under reg 22(6)(a)(i) of the 1982 Regulations. It is common ground that the applicant was not informed of the grounds upon which the first respondent made the decision to make the recommendation which recommendation received the assent of the Yang di-Pertuan Agong on 7 July 2008.

[6] Dissatisfied with this decision the applicant filed an application for judicial review for declaratory orders that the cancellation of his commission under s 9 was null and void, for that decision to be quashed by way of certiorari, for an order of mandamus compelling the respondents to reinstate him, as well as damages.

[7] The High Court judge ruled that the decision of the first respondent, if contrary to law, or if they had acted in excess of jurisdiction was amenable to being reviewed by way of judicial review. The judge further ruled that the Yang di-Pertuan Agong was not required to give the applicant an opportunity to show cause before giving his assent under s 9 of the Act and reg 20(2)(e) of the 1982 Regulations. The learned judge then however held, cases of misconduct and negligence by an officer of the armed forces has to be determined by a Court Martial and that no other action could be taken against such an officer. The learned judge then concluded that the decision of the first respondent to recommend to the Yang di-Pertuan Agong to cancel the applicant's commission under s 9 and retire him under 20(2)(e) of the 1982 Regulations was contrary to law by reason of the failure to give an explanation as to why the first respondent made the recommendation which they did to the Yang di-Pertuan Agong.

THE SUBMISSIONS

[8] The senior federal counsel submitted that misconduct on the part of a member of the armed forces may be the subject matter of disciplinary action. However it was also open for the respondents to take any other alternative action in respect of such misconduct. There is a distinction between 'cancellation of a commission and retirement' as contrasted with 'disciplinary action' taken against an officer of the armed forces.

[9] Section 9 of the Act clearly confers upon the Yang Di-Pertuan Agong the prerogative power, upon the recommendation of the first respondent, to cancel an officer's commission. This provision reads as follows:

The Yang di-Pertuan Agong may on the recommendation of the Armed Forces Council at any time without assigning any reason therefor cancel any commission granted under the provisions of this Part.

[10] Regulation 20(2)(e) of the 1982 Regulations provides as follows:

20 (2) Yang di-Pertuan Agong boleh menghendaki pegawai supaya bersara dari perkhidmatan —

(e) oleh kerana ketidakcekapan atau sebab-sebab lain di dalam kawalannya sendiri tetapi tidak terjumlah kepada salahlaku.

[11] The senior federal counsel highlighted the fact that there was no 'decision' as such on the part of the first respondent amenable to being reviewed by way of judicial review. The power to decommission under s 9, and the power to retire an officer under reg 20(2)(e), lies with the Yang di-Pertuan Agong and not with the first respondent. He submitted that the learned judge erred in ruling that the cancellation of the applicant's commission by the Yang Di-Pertuan Agong under s 9 of the Act and retirement under reg 20(2)(e) of the 1982 Regulations was amenable to judicial review. By adopting an objective test as to the reasons why the first respondent made its recommendation to the Yang di-Pertuan Agung to cancel the applicant's commission under s 9 and to retire him under 20(2)(e) of the 1982 Regulations, the judge had conferred upon himself an appellate jurisdiction which he was not entitled to do. Judicial review is concerned not with the decision, but a review of the manner in which the decision was made. Judicial review is concerned with the decision making process, not with the decision. On this ground alone the application should have been dismissed by the learned judge.

[12] On the issue of whether there is a right for the applicant to be given a hearing by the first respondent before making its recommendation to the Yang di-Pertuan Agong, the SFC submitted that there is no provision for the applicant to be accorded a right to be heard in this case. Article 135(1) read with art 132 of the Federal Constitution excludes the Armed Forces services of the right to be heard. Reference was then made to the Court of Appeal's decision in *Abdul Salam bin Husin v Majlis Angkatan Tentera & Anor* [2009] 6 MLJ 170, which decision was upheld by the Federal Court in *Abdul Salam Husin v Majlis Angkatan Tentera & Anor* [2011] 2 CLJ 1 as authority for this proposition.

[13] On behalf of the applicant/respondent, it was argued that it was incumbent upon the first respondent to issue a notice to the applicant stating the grounds upon which first respondent proposed to make a recommendation to the Yang di-Pertuan Agong under s 9. The first respondent had, on the facts

of this case, failed to furnish the grounds upon which the recommendation to cancel the applicant's Commission and be retired from service was made to the Yang di-Pertuan Agong. The applicant had accordingly not been accorded an opportunity of being heard contrary to art 135(2) of the Federal Constitution. The applicant should have been given such an opportunity to be heard at this pre-recommendation stage. The first respondent should not have acted arbitrarily. As the applicant had not been given an opportunity of being heard at the pre-recommendation stage, the decision made by the Yang di-Pertuan Agong based on such a recommendation is accordingly null and void entitling the applicant to the orders applied for, as well as damages.

DECISION

[14] Firstly, I observe to note that there is nothing to show that the recommendation of the first respondent was based on any alleged misconduct on the part of the applicant. Secondly on the contention of the applicant that he should be tried through a Court Martial if he had if he had committed any misconduct, I am of the view that the option to end the relationship between the applicant and the respondents are well within the discretion of the respondents and the Yang di-Pertuan Agong. I am of the view that the fact that some allegations of misconduct had earlier been made against the applicant would not bar the respondents from terminating the services of the applicant pursuant to the terms of employment. It is open for the respondents, as employer, to choose between the two or several options available to end the relationship with an employee.

[15] It is clear that an officer in the armed forces holds office at the will and pleasure of the Yang di-Pertuan Agong by reason of s 9 of the Act. The legislative intention by usage of the words 'at any time without assigning any reasons' in s 9 (which power was exercisable not necessarily to cases of misconduct) to cancel any commission must necessarily be construed to mean that, as far as members of the armed forces is concerned, an arbitrary power is conferred upon the Yang di-Pertuan Agong to cancel the commission of an officer of the armed forces upon the recommendation of the first respondent. I am of the view that a court has no jurisdiction to inquire into circumstances under which an officer of the armed forces (of which the applicant was a member) and the circumstances the applicant ceased to hold office. The learned judge accordingly erred in ruling that it was incumbent upon the respondents to act against the appellant by way of Court Martial by reason of an earlier alleged misconduct.

[16] On the complaint of the applicant of being denied an opportunity of being heard by the first respondent prior to making its recommendation to the Yang di-Pertuan Agong and not being put to notice as to grounds upon which

the first respondent's recommendation was grounded, I am of the following view. The rule of natural justice vary in content and ambit according to the circumstances and context. On the facts of this case the following constitutional provisions applies. Articles 132(1) and 135 of the Federal Constitution states:

132

(1) For the purposes of this Constitution, the public services are —

(a) the armed forces;

(b) the judicial and legal service;

(c) the general public service of the Federation;

(d) the public force;

(e) (repealed);

(f) the joint public services mentioned in Article 133;

(g) the public service of each State; and

(h) the education service.

...

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135

(1) No member of any of the services mentioned in paragraph (b) to (h) of clause (1) of Article 132 shall be dismissed or reduced in rank by any authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank;

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given areasonable opportunity of being heard.

[17] The express exclusion of the public service of 'armed forces' in art 135(1) must necessarily be construed to mean that an officer in the armed forces does not enjoy the right of being heard conferred on members of the public services mentioned in art 132. The Legislature had clearly evinced an intention to exclude the operation of the *audi alteram* to officers in this category of public service.

[18] In *Abdul Salam Husin v Majlis Angkatan Tentera & Anor* [2011] 2 CLJ 1 at p 12 James Foong FCJ speaking for the Federal Court on this issue, after referring to several authorities, held:

[17] …, the most prevalent reason seem to stem from the fact that the commission of a member of the armed forces is at the pleasure of the Crown: durante bene placito (which basically means: 'during our good pleasure'). When such

commission is at the pleasure of the Crown then conversely it can be withdrawn or cancelled at any time at the pleasure of the Crown. The Crown is not obliged to give any reason for doing so.

[18] Another reason for the deprivation of this right to be heard prior to cancellation of a commission is public policy. As members of the armed forces play an important role in the defence of the nation, the continuance of any of its members may at times be detrimental to the best interest of the state; the security of the country may be compromised if he is allowed to remain.

[19] One other more pertinent reason is the necessity to maintain discipline within the armed forces which is absolutely vital if the military is to be functional and efficient. Any compromise to this would affect discipline and threaten the chain of command necessary to effectively defend the nation.

[20] With the Constitution expressly exempting the armed forces from this right to be heard before cancellation of a commission, can it be argued that this is only limited to the time when the Yang di-Pertuan Agong cancels a commission and not when the Armed Forces Council deliberate on the recommendation to be made? It is my considered view that if the answer is in the positive, the entire provision of cl 1 in art 135 of the Constitution as well as s 9 of the Armed Forces Act would be rendered meaningless. The supreme law of the land and the Armed Forces Act have expressly and unequivocally pronounced the exemption of this right to be heard for members of the armed forces and the rationale for this is already discussed. To give full effect to the objective and intention of these provisions of the law, it is my opinion that this exemption must apply throughout and at every stage leading to the cancellation of the commission. This entire process, though involving stages, cannot be taken separately and by piece meal and interject a right to be heard in a particular stage. If this were to be accepted, then cl 1 of art 135 of the Constitution and s 9 of the Armed Forces Act would be frivolous and nugatory.

[19] James Foong, FCJ then reiterated:

[21] … that it is the court's duty to give effect to the provisions of the Constitution and statutory law without attempting to modify and qualify it, particularly when there is no ambiguity. There are situations, like in this case, where the laws are explicit and enacted as such for good measures to discount such common law rights of audi alteram partem in the armed forces

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…

…

[25] To repeat, in this instant case there is clear provision of the law in cl 1 of art 135 of the Constitution read with art 132 and s 9 of the Armed Forces Act divesting such right to be heard for members of the armed forces prior to the cancellation of their commission of service. With such explicit provisions in the law, this court is in no position nor would it lend a hand in interpreting into the law such

a right. This divested right applies to all stages or tiers leading to the cancellation of the commission. Any attempt to read into the law the existence of such right at some stage of this process would be defeating the true intention and spirit of the Constitution and the relevant provision of the Armed Forces Act.

[20] To conclude I am of the view that the High Court judge erred in ruling that the cancellation of the applicant's commission and retirement to be contrary to law and in allowing the applicant's claim. On the contrary I am of the view that the cancellation and retirement of the applicant by the respondents is valid and of full legal effect.

[21] The majority decision was to allow the appeal. The High Court judge's decision is set aside and the applicant's claim is dismissed with costs. Costs of RM5,000 to the appellants.

Mohd Hishamudin JCA (dissenting):

[22] This is an appeal against the decision of the High Court of Kuala Lumpur (Appellate and Special Powers Division) of 3 August 2010.

[23] The learned judge of the High Court of Kuala Lumpur (Appellate and Special Powers Division) had allowed the respondent's application for judicial review against the decision of the Yang di-Pertuan Agong (His Majesty the King):

(a) cancelling the commission of the respondent pursuant to s 9 of the Armed Forces Act 1972 ('the Act'); and

(b) requiring of the respondent to retire from service pursuant to reg 20(2)(e) of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 ('the Regulations').

[24] The above decision is dated 7 July 2008.

[25] Aggrieved by the decision of the High Court, the appellants appeal to this court.

[26] I am dismissing this appeal with costs. The following are my grounds.

THE BACKGROUND FACTS

[27] The respondent at the time of the cancellation of his commission and his forced retirement was an air force officer of the Royal Malaysian Air Force

('RMAF') holding the rank of major. He had been in the armed forces for 27 years. He had been a commissioned officer since August 1981.

[28] In July 2008 he received a message directing him to report to the Human Resource Division of the Air Force Headquarters for a 'career interview'. He reported accordingly as directed. There, at the division, he was told by the director of the division that his commission had been cancelled and that he had been retired under reg 20(2)(e) of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982. The director showed him a letter dated 8 July 2008 that he received written by one Lt Col Ahmad bin Abd Rahman on behalf of the Chief of the RMAF (*Panglima Tentera Udara*) addressed to the Human Resource Division of the RMAF. The letter states that the decision to cancel his commission under s 9 of the Act and to retire him from service under reg 20(2)(e) of the Regulations was made by the Armed Forces Council at its 470th meeting held on 24 June 2008. The letter does not state the effective date of the cancellation of the commission; but according to para 1(b) of the letter the forced retirement was to take effect from 17 July 2008.

[29] He was not told the reason for the cancellation of the commission, or the reason as to why he was retired.

[30] Now, what had happened was that, earlier, unbeknown to the respondent, the Armed Forces Council at its 470th meeting held on 24 June 2008 had made a decision to recommend to His Majesty the King pursuant to s 9 of the Armed Forces Act 1972 and reg 20(2)(e) of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 that the commission of the respondent be cancelled and that he be required to retire from service, although he has yet to attain the age of compulsory retirement. The minutes of the 470th meeting of the Armed Forces Council reads:

KEMENTERIAN PERTAHANAN

MAJLIS ANGKATAN TENTERA

KP/MAT(S) 17/812/6 KLT.4 (97)

M/MAT(2008) 470

1 Julai 2008

MINIT MESYUARAT MAJLIS ANGKATAN TENTERA KE-470

PADA 24 JUN 2008 JAM 11.00 PAGI

DI BILIK MESYUARAT BUNGA RAYA

KEMENTERIAN PERTAHANAN

Hadir

Yang Amat Berhormat

Pengerusi

Timbalan Perdana Menteri merangkap Menteri Pertahanan

(YAB. Dato' Sri Mohd Najib bin Tun Haji Abdul Razak)

Ketua Setiausaha

Setiausaha

(Dato' Abu Bakar bin Hj Abdullah)

Penyimpan Mohor Besar Raja-Raja Malaysia

(Y.M. Engku Tan Sri Ibrahim bin Haji Engku Ngah)

Panglima Angkatan Tentera

(Jeneral Tan Sri Abdul Aziz bin Haji Zainal)

Panglima Tentera Darat

(Jeneral Tan Sri Muhammad Ismail bin Haji Jamaluddin)

Panglima Tentera Laut

(Laksamana Datuk Abdul Aziz bin Haji Jaafar)

Panglima Tentera Udara

(Jeneral Tan Sri Dato' Sri Azizan bin Ariffin TUDM)

Ketua Staf Markas Angkatan Tentera Malaysia

(Leftenan Jeneral Datuk Haji Shahron bin Haji Ibrahim TUDM)

Asisten Ketua Staf Perkhidmatan Anggota (Mejar

Jeneral Datuk Abdul Aziz bin Ibrahim)

Mej Fadzil bin Arshad TUDM (713116) Kejuruteraan

(1) Dibatalkan tauliah daripada perkhidmatan Angkatan Tentera Malaysia di bawah Seksyen 9, Akta Angkatan Tentera 1972.

(2) Dibersarakan daripada perkhidmatan Angkatan Tentera mulai 17 Julai 2008 di bawah Peraturan 20(2)(e), Peraturan-Peraturan Angkatan Tetap (Pencen, Ganjaran dan Faedah-Faedah Lain) 1982.

(3) Diberi Pencen Perkhidmatan dan Ganjaran Perkhidmatan pada kadar 90 peratus di bawah Peraturan 22(6)(a)(i), Peraturan-Peraturan Angkatan Tetap (Pencen, Ganjaran dan Faedah-Faedah Lain) 1982.

(4) Tidak dibenarkan mengikuti Latihan Peralihan sebagaimana yang ditetapkan oleh PMAT Bilangan 5 Tahun 2005.

(5) Dikehendaki membayar balik baki Pinjaman Perumahan Kerajaan mengikut kadar faedah semasa yang ditetapkan oleh Perbendaharaan melalui potongan bayaran pencen bulanannya yang diterimanya.

(6) Tidak dibenarkan mengguna gelaran pangkat Mejar TUDM yang disandang sekarang selepas bersara daripada perkhidmatan berdasarkan

Perenggan 4 dan 5 kepada Perintah Majlis Angkatan Tentera Bilangan 1 Tahun 1975.

Keputusan ini adalah tertakluk kepada perkenan Seri Paduka Baginda Yang di Pertuan Agong

Tindakan:	Sekretariat MAT
	Panglima Tentera Udara

Rujuk: MATM/J1 CTKnrKB/146/3/9/500 bth 23 Jun 2008

[31] The Armed Forces Council is established under art 137 of the Federal Constitution. Under cl (1) of art 137 the Armed Forces Council is responsible under the general authority of the Yang di-Pertuan Agong for the command, discipline and administration of the armed forces.

[32] It is significant to note that the minutes of the 470th meeting of the Armed Forces Council do not state the facts and the reasons for the decision.

[33] The letter of 'recommendation' (as to why I am putting the word 'recommendation' in inverted comas will be apparent shortly) to His Majesty dated 27 June 2008 was written by the Secretary of the Armed Forces Council. It reads:

MAJLIS ANGKATAN TENTERA,

KEMENTERIAN PERTAHANAN,

TINGKAT 5, WISMA PERTAHANAN.

JALAN PADANG TEMBAK

50634 KUALA LUMPUR

KP/MAT(S)17/811/1/8 KLT.12(76)

27 Jun 2008

DIPERKENANKAN:. YANG DI-PERTUAN AGONG 7 JUL 2008

Encik Mohd Zuki bin Ali

Setiausaha Sulit Kanan Kepada

SPB Yang di-Pertuan Agong

Istana Negara

50500 KUALA LUMPUR

Tuan,

MEMBERSARAKAN PEGAWAI/PEMBATALAN TAULIAH DAN DIBERHENTIKAN DARIPADA PERKHIDMATAN ANGKATAN TENTERA

Dengan hormatnya dimaklumkan bahawa Majlis Angkatan Tentera di Mesyuarat Ke-469 yang bersidang pada 27 Mel 2008 telah memperakukan *Membersarakan Pegawai/Pembatalan Tauliah Jangka Pendek dan Diberhentikan Daripada Perkhidmatan Angkatan Tentera* bagi 4 orang pegawai-pegawai di bawah Seksyen 9, Akta Angkatan Tentera 1972, Peraturan-Peraturan 20(2)(e),(g) kepada Peraturan-Peraturan Angkatan Tetap (Pencen, Ganjaran dan Faedah-Faedah Lain) 1982 dan Perenggan 8g dan 13, Kepada Perintah Majlis Angkatan Tentera Bilangan 1 Tahun 2004, iaitu:

Seksyen 9

Yang di-Pertuan Agong boleh atas syor Majlis Angkatan Tentera pada bila-bila masa tanpa memberi apa-apa sebab membatalkan mana-mana tauliah yang dikumiakan di bawah peruntukan-peruntukan bahagian ini.

Peraturan 20(2)(e) dan (g)

Yang di-Pertuan Agong boleh menghendaki pegawai supaya bersara daripada perkhidmatan:

(e) oleh kerana ketidakcekapan atau sebab-sebab lain di dalam kawalannya sendiri tetapi tidak terjumlah kepada salahlaku.

(f) oleh kerana salahlaku.

Sukacita saya mendapat kerjasama tuan mempersembahkan kepada Seri Paduka Baginda Yang di-Pertuan Agong dan memohon perkenan Baginda di atas perakuan tersebut. Setelah diperkenankan, mohon kembalikan salinan asal surat ini untuk tindakan selanjutnya.

Sekian, terima kasih.

BERKHIDMAT UNTUK NEGARA

Saya yang menurut perintah,

t.t.

DATO' ABU BAKAR BIN HAJI ABDULLAH

Setiausaha Majlis Angkatan Tentera

[34] It is also important to note that the above letter to His Majesty also does not state the facts or reasons for the 'recommendation'. But do note that His Majesty signified his assent in the above letter itself — on 7 July 2008.

[35] By a letter dated 9 July 2008 addressed to the Chief of the RMAF, the

respondent appealed against the decision to cancel his commission and to retire him. There was, however, no response to the appeal.

[36] Instead, on 15 August 2008 he was served with a letter dated 24 July 2008 directing him to settle the 'documentation procedure' for his retirement including collecting his civilian identity card and settling his income tax.

CANCELLATION OF COMMISSION

[37] Section 9 of the Armed Forces Act 1972 provides:

> 9 Cancellation of commissions
>
> The Yang di-Pertuan Agong may on the recommendation of the Armed Forces Council at any time without assigning any reason therefore cancel any commissions granted under the provisions of this Part.

[38] In my judgment, according to the above provision, His Majesty the King may cancel an officer's commission only on the *recommendation* of the Armed Forces Council; and in cancelling the commission His Majesty need not have to give any reason, in the present case, however, as I see it, there has not been any *recommendation* by the Armed Forces Council. The letter to His Majesty dated 27 June 2008 from Dato' Abu Bakar, the Chief Secretary of the Ministry of Defence cum Secretary of the Armed Forces Council, that I referred to earlier, is, to my mind, not a *recommendation* for the purpose of s 9. It is merely a document that *purports* to be a recommendation under that provision. I so hold because, in my view, for the letter of the Secretary of the Armed Forces Council to be a recommendation to His Majesty in the sense as envisaged by s 9 of the Act, the letter must contain the facts and the reasons for requesting His Majesty to cancel the respondent's commission. But in the present case the letter to His Majesty does not contain the necessary facts and the reasons for the 'recommendation'. It is obvious that the letter merely requested His Majesty to cancel the respondent's commission and to require the respondent to retire; and nothing more than just that. This, to my mind, is highly improper and not in accordance with the intention and spirit of s 9 of the Act. It could not have been the intention of s 9 of the Act that His Majesty has no discretion at all in the matter and should act in a mechanical manner. It could not have been the intention of s 9 that the Armed Forces Council is only required to make a request to His Majesty — and just that. That would be demeaning to His Majesty who under art 41 of the Federal Constitution is the Supreme Commander of the armed forces; and that the Armed Forces Council functions under the general authority of His Majesty as the Supreme Commander. As the Supreme Commander of the armed forces, His Majesty's role could not have been intended by the framers of our Constitution to be merely symbolic or just a figure head. Surely His Majesty is expected to play an

effective and meaningful role as the Supreme Commander. According to the *Concise Oxford Dictionary,* (11th Ed), (revised) 'recommendation' means:

> Recommendation n. a suggestion or proposal as to the best course of action.

[39] Clearly it is far fetched to suggest that the above 'bare' letter to His Majesty is a suggestion or proposal as to the best course of action to be taken against the respondent. Hence, on the facts of the present case there was no recommendation — or rather, no valid recommendation — of the Armed Forces Council before His Majesty. If there was no recommendation, or no valid recommendation of the Armed Forces Council before His Majesty, then His Majesty could not have exercised his power to cancel the respondent's commission pursuant to s 9. For, the exercise of His Majesty's power under that section is dependent upon there being, in the first place, a valid recommendation of the Armed Forces Council made to His Majesty. Therefore, the act of His Majesty cancelling the respondent's commission, with respect, is ultra vires s 9 of the Act.

[40] That the act of His Majesty was, with respect, ultra vires s 9 of the Act can also be looked at from another perspective. In my opinion, under the provision of s 9, His Majesty is expected to, and indeed must, exercise his discretion. His Majesty is not expected to act and cannot act in a mechanical fashion. He must apply his mind to the matter before him: whether or not the commission of the respondent should be cancelled. The *Wednesbury* principle requires His Majesty to make a rational and reasonable decision (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). His Majesty cannot act arbitrarily or unreasonably. But His Majesty can only exercise his discretion rationally and reasonably if he has the facts and reasons before him. In the present case, however, the manner the letter to His Majesty from the Armed Forces Council is written, in not stating the facts and the reasons (for 'recommending' the cancellation of the commission), it is obvious that the Armed Forces Council expects His Majesty to act in a mechanical fashion. It is obvious that the Armed Forces Council views the role of His Majesty under s 9 as nothing more but a mere formality, notwithstanding the fact that His Majesty under the Federal Constitution is the Supreme Commander of the armed forces and that the Armed Forces Council acts under the general authority of His Majesty as the Supreme Commander. But it is obvious too that His Majesty, with respect, had in fact acted in a mechanical fashion. It is, however, true that under s 9 His Majesty, in cancelling the respondent's commission, need not give any reason for the cancellation to the officer concerned. But, with the greatest respect, this does not mean that His Majesty may act in a mechanical fashion. In *Jain on Administrative Law of Malaysia and Singapore,* (3rd Ed) by Prof MP Jain, the learned author states (at p 495):

Acting mechanically

An authority vested with discretion has to apply its mind to the facts and circumstances of the case before taking an action. If it passes an order mechanically without applying its mind, its act will be ultra vires. This principle is illustrated by *Emperor v Sibnath Baneijee*. The Home Secretary issued an order of preventive detention in a routine manner on the advice of the police without himself applying his mind to the materials before him and satisfying himself, independently of the police recommendation, whether an order of preventive detention was called for or not in the circumstances of the case. The Home Department followed a practice of issuing a detention order automatically when the police recommended it and the Home Secretary did not personally satisfy himself whether such an order was justified or not in a specific case. The Privy Council quashing the order ruled that the Home Secretary's personal satisfaction in each case was a condition precedent to the issue of the order otherwise it would be invalid.

[41] Furthermore, in the present case the Armed Forces Council, in not stating the facts and reasons in its 'recommendation' to His Majesty, had not only failed to satisfy the statutory requirement of s 9 but had also acted arbitrarily and unreasonably. In the first place, there is this pertinent question that needs to be asked. Did the Armed Forces Council have a reason to cancel the respondent's commission? It is true that under s 9 His Majesty need not assign any reason for the cancellation of the commission. I would interpret 'without assigning any reason' here, under this section, to mean that His Majesty need not have to *give* any reason for the cancellation of the commission. But this does not mean that the Armed Forces Council can just arbitrarily, without any reason whatsoever, suggest (or 'recommend') to His Majesty that an officer's commission be cancelled. That, to my mind, could not have been the intention of s 9. The Armed Forces Council must have a reason. And it could not be just *any* reason; as, for example, that on a particular day the respondent had worn a yellow sock to office! The council could not act at its whim and fancy. The council has a duty to act rationally and reasonably. The *Wednesbury* principle equally applies to the Armed Forces Council — just as it applies to His Majesty. But if the Armed Forces Council did in fact *have* a reason, then that reason must be conveyed to His Majesty when making the 'recommendation'. But, instead, we have here a situation where the letter of the Armed Forces Council to His Majesty does not state any reason whatsoever for requesting His Majesty to cancel the respondent's commission (or to require him to retire). But not only that: even the minutes of the 470th meeting of the Armed Forces Council do not contain any reason for the 'recommendation'. I have closely examined the affidavit of Dato' Abu Bakar, the Secretary of the Armed Forces Council, but I am unable to find anywhere in the affidavit that suggests or implies that the Armed Forces Council had a reason to 'recommend' to His Majesty the cancellation of the commission (or to require the respondent to retire). This court cannot *assume* that the Armed Forces Council had a reason, let alone a reason that is reasonable and rational. The

only fair inference that can be drawn here from the facts is that the Armed Forces Council did not have any reason whatsoever to 'recommend' to His Majesty that the commission of the respondent be cancelled (or that he be required to retire). This means that the Armed Forces Council, in making the request to His Majesty, had acted unreasonably or arbitrarily.

[42] Indeed, it is pertinent to observe that the affidavit of Dato' Abu Bakar, the Secretary of the Armed Forces Council, does not provide any reason for the cancellation of the commission (or the reason for the forced retirement of the respondent); and neither does the minutes of the 470th meeting of the Armed Forces Council held on 24 June 2008. Significantly, the affidavit of Dato' Abu Bakar does not suggest any wrongdoing on the part of the respondent. In fact the affidavit of Dato' Abu Bakar acknowledges the excellent services rendered by the respondent during the 27 years that he served the RMAF (see para 28 of Dato' Abu Bakar's affidavit); and Dato' Abu Bakar in his affidavit takes pain to state (see paras 23 and 26 of the affidavit) that the action of the Armed Forces Council in 'recommending' to His Majesty had nothing to do with s 161 of the Act (s 161 of the Act deals with wrongdoings on the part of an officer or a serviceman). However, neither does Dato' Abu Bakar, in his affidavit, explain as to why such a drastic action was taken against the respondent. Confidentiality of information pertaining to the reason for the 'recommendation' is not pleaded. In other words, Dato' Abu Bakar in his affidavit does not say that the Armed Forces Council has a reason for the 'recommendation' to His Majesty but he is prevented from revealing the reason in his affidavit by reason of the Official Secrets Act. The affidavit of Dato' Abu Bakar is defensive in nature and uninformative.

THE REQUIREMENT TO RETIRE UNDER REG 20(2)(E)

[43] As can be seen from the documents that I have highlighted above, the cancellation of the commission was not the only action taken against the respondent by the Armed Forces Council. Apart from cancelling his commission, His Majesty, on the 'recommendation' of the Armed Forces Council, also required the respondent to retire pursuant to reg 20(2)(e) of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982. Regulation 20(2)(e) states:

> (2) The Yang di-Pertuan Agong may require an officer to retire from the service —
>
> (a) …
>
> (e) for Inefficiency or other causes within his own control but not amounting to misconduct;

[44] Although 'commission' and 'retirement' are two separate matters, the Armed Forces Council, however, regarded the matter as closely interlinked and

had forwarded its 'recommendation' to His Majesty on these two matters simultaneously in just one document, that is, the letter of 27 June 2008 (after being decommissioned, the respondent, if he is not forced to retire simultaneously, technically, he becomes a serviceman). Now, although reg 20(2)(e) of the Regulations, unlike s 9 of the Act, does not contain the words 'on the recommendation of the Armed Forces Council' it appears to be common ground — and I think the provision must be read as such — that His Majesty, as the Supreme Commander of the armed forces, may only act under reg 20 of the Regulations on the recommendation of the Armed Forces Council. However, just like the case of the cancellation of the commission, the Armed Forces Council's letter of 27 June also does not provide His Majesty the facts and reasons for the 'recommendation' pertaining to the forced retirement. Again here I also hold that this omission is fatal to the so called 'recommendation' of the Armed Forces Council as well as to the decision of His Majesty. My reasoning and criticisms in respect of the cancellation of the commission issue equally applies here. Indeed, the need for the facts and reasons to be provided to His Majesty here, in the case of the respondent's forced retirement, is stronger as compared to the case of the cancellation of the commission. For, firstly, here, in the case of reg 20(2)(e) of the Regulations, unlike s 9 of the Act, the words 'without assigning any reason therefor' are absent. Secondly, reg 20(2)(e) of the Regulations prescribes what ought to be the reason (for requiring the personnel to retire), that is, 'for inefficiency or other causes within his own control' (and in interpreting the phrase 'or other causes within his own control' we must apply the *ejusdem generis* rule of statutory interpretation); and what ought not to be the reason: 'for misconduct' (if it is for misconduct, then the action must be taken under a different limb ie limb (g) of sub-reg (2) of reg 20). Therefore, the Armed Forces Council had acted arbitrarily in 'recommending' to His Majesty on the compulsory retirement of the respondent, and His Majesty had acted in a mechanical fashion and without a valid recommendation from the Armed Forces Council in requiring the respondent to retire under reg 20(2)(e) of the Regulations.

[45] However, there is another reason why I think that the decision of His Majesty with regard to the forced retirement, with respect, is bad in law. It is this. The respondent has never been notified of the reason for his forced retirement. In my judgment, the respondent is entitled to be notified the reason as to his forced retirement. In my opinion, it is the intention of the Regulations that the reason be made known to the personnel in question, and in the present case, the respondent; otherwise, why are the words 'without assigning any reason therefore', found in s 9 of the Act, not inserted in reg 20; and why must limb (e) of sub-reg (2) of reg 20 spell out what ought to be the reason for the forced retirement and what ought not be the reason? It must be borne in mind that there is nothing in the Act that states that an officer who is decommissioned (and who thereafter becomes a serviceman) automatically has to be compulsorily retired under reg 20. It must also be borne in mind that the

reputation of the respondent is adversely affected when all of a sudden he is told that he has to go on forced retirement, not to mention the adverse effect on his livelihood. Hence it is wrong and cruel that he is not told of the reason for the forced retirement.

[46] Encik Zalil, learned counsel for the respondent, submits that the respondent is entitled to be heard before the Armed Forces Council made a decision to 'recommend' to His Majesty that the respondent be retired pursuant to reg 20(2)(e) of the Regulations. This is an interesting point. I am, of course, mindful of *Abdul Salam bin Husin v Majlis Angkatan Tentera & Anor* [2011] 2 CLJ 1. But that case, as rightly pointed out by En Zalil, concerns s 9 of the Act, and not with reg 20(2)(e) of the Regulations, and hence is irrelevant. But be that as it may, with respect, as there has been no valid recommendation made by the Armed Forces Council to His Majesty pertaining to the forced retirement, meaning that this very fact alone had made the decision of His Majesty was ultra vires reg 20, I find it unnecessary to go into this issue as to whether or not the respondent is entitled to be heard.

[47] Appeal dismissed with costs.

Appeal allowed, setting aside the High Court's decision and respondent's claim dismissed with costs.

Reported by Ashok Kumar